DEFAULT

- Forfeiture of contract rights
- Liability for damages to the other party
- Economic consequences vary by contract type
  - cost reimburse
  - fixed price

LIABILITY
(Fixed Price Contracts)

- Common Law Damages
  - anticipatory profits
  - consequential damages
  - recovery not subject to cost principles governing allowability of costs (Government breach)

LIABILITY (cont'd)

- Government Procurement (Contractor Default)
  - refund of unliquidated progress payments/financing
  - excess costs of reprocurement
  - other rights and remedies provided by law (breach)

LIABILITY (cont'd)

- Duty to mitigate Duty Damages
  - if fail, damages recovered in reduced amount? (Boards)
  - if fail, Government loses right to collect damages altogether? (Courts)

LIABILITY (cont'd)

- Liquidated Damages
  - must be appropriate to use (See FAR 12.202)
    -- time of essence/reasonable
  - must not be a penalty
  - look at anticipated damages as of time of
    contracting, not when breach occurs

DEFAULT GROUNDS

- Failure to make timely delivery
  - should not send 10 day cure notice, but may
    send “show cause” notice
  - time is of the essence
  - substantial compliance doctrine
  - acceptance of non-conforming goods
  - acceptance of non-conforming services
  - substantial performance doctrine

DEFAULT GROUNDS

- **Failure to make progress so as to endanger performance**

  - The standard: Government must show by a preponderence of the evidence that Contractor has demonstrated a lack of due diligence in performing-do not have to prove that it will be impossible for the Contractor to perform within the contract schedule-reasonable basis to doubt that contract will be timely performed is sufficient.

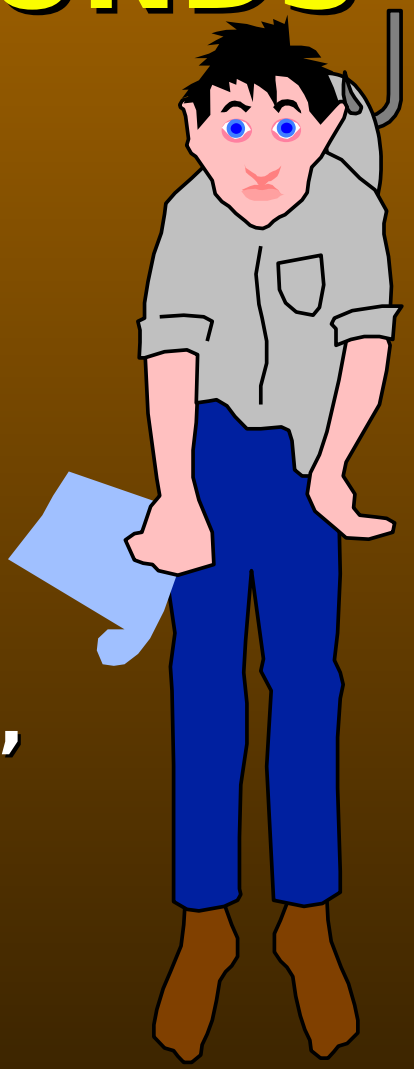
  William A. Hulett, AGBCA No. 91-230-3 et al, 92-3 BCA (9/2/92)

DEFAULT GROUNDS

- Failure (cont'd)
  - 10 day Cure notice
    -- condition to the Government's right to default
    -- purpose is to seek assurances as to the Contractor's intent and ability to perform (on time)

DEFAULT GROUNDS

- Failure to comply with any other contract provision
  - must be a material requirement
    -- Equal Employment Opportunity, bonds, etc.
  - 10 day cure notice required



DEFAULT GROUNDS

- **Anticipatory Repudiation**
  - **not mentioned in the clause**
  - **contractor must clearly and unequivocally indicate its unwillingness (refusal) or inability to perform**
  - **Government must show "positive, definite, unconditional, and unequivocal evidence of (contractor's) intent to breach"**
  - **it is not enough that the contractor is willing to complete contract**

WAIVER OF RIGHT TO DEFAULT

- Waiver of delivery schedule?
  - can be anticipatory as well as after contractor fails to timely deliver
  - still liable for breach of contract damages?
- Waiver of right to default?
  - Services - acceptance with a price reduction?
  - Supply - DeVito Doctrine
  - Construction - no Estoppel Issue

WAIVER OF RIGHT TO DEFAULT

- De Vito Doctrine

  - De Vito v. U.S. , 188 Ct. Cl. 979, 413 F2d 1147 (1969)

    -- based upon Estoppel Theory

    -- encouraging continued performance or failure to default within reasonable time

    -- even a lengthy passage of time may not preclude default termination

RESTABLISHING THE RIGHT TO DEFAULT

- Government Right to Consideration
- New delivery schedule
  - bilaterally agreed-to
  - unilaterally establish new schedule

DEFAULT PROCEDURES

- Final decision of contracting officer
  - right to appeal
    - - 90 days to Board of Contract Appeals
    - - 12 months to U.S. Court of Federal Claims
- Federal Courts Administration Act of 1992

INVALID TERMINATIONS FOR DEFAULT?

- Continuing need
- Arbitrary / Capricious
  - converted to termination for convenience
- Bad Faith
  - courts / boards reluctant to find
  - Government breach
- Alternate grounds to support invalid default termination

CLAIMS BY DEFAULTED CONTRACTORS

- Defective contract drawings
- Impossible specifications
  - Government breach of contract
  - not routine rights to equitable adjustment
- Fulford Doctrine

TERMINATION FOR THE CONVENIENCE OF THE GOVERNMENT

- Christian Doctrine
- Recovery (Fixed Price Contracts)
- Partial Termination for Convenience

INVALID TERMINATIONS FOR CONVENIENCE

- Must reasonably exercise discretion
- Must not act in bad faith
- Changed circumstances required?

TERMINATION FOR CONVENIENCE AFTER CONTRACT COMPLETION?

- Can only terminate executory portions of contract
- Full performance ?
- Breach Damage